

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6169

PETITION OF JANET S. AUSTIN AND CRAIG BRASFIELD
(Hearings held November 8 and November 22, 2006)

OPINION OF THE BOARD
(Effective date of Opinion, February 9, 2007)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59, Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(b)(2). The petitioners propose the construction of a one-story addition that requires a variance of 14.40 feet as it is within 5.60 feet of the rear lot line. The required rear lot line setback is twenty (20) feet.

At the public hearing on November 22, 2006, the variance request was amended to require a variance of thirteen (13) feet, as it would be within seven (7) feet of rear lot line.

Joe Moore, a colleague and friend, appeared with the petitioners at the public hearing.

The subject property is Lot 12, Block A, located at 11006 Madison Street, Kensington, Maryland, 20895, in the R-60 Zone (Tax Account No. 01131915).

Decision of the Board: Requested variance **granted, as amended.**

EVIDENCE PRESENTED TO THE BOARD

1. The petitioners propose the construction of 13 x 24 foot one-story addition in the western rear yard.
2. The petitioners testified that their lot is a corner property, located at the intersection of Madison Street and Anderson Road. The petitioners testified that the lot is irregularly-shaped with acute angles, which results in a very shallow buildable envelope. The petitioners testified that the irregular shape of the lot prevents new construction in most areas of the property and that the lot's topography in the rear yard has a severe slope. See Exhibit Nos. 4(a) and 4(b) [site plans] and 7 [zoning vicinity map].

3. The petitioners testified that although their lot has more square footage than most the neighboring lots, the lot has the smallest buildable envelope when compared to the ten neighboring lots along Anderson Road and Madison Street. The petitioners testified that currently the lot coverage of the existing structures on the property is 15% and will increase to 20% with the proposed addition. The petitioners testified that their lot is 7,318 square feet in size. See Exhibit Nos. 4(c) [EBL calculations] and 13(a) [revised site plan].
4. The petitioners presented two letters from their physicians at the hearing held on November 22, 2006, Raphaela Goldbach-Mansky, MD MHS and John W. Griffin, MD. Dr. Goldbach-Mansky's letter states "For over 30 year, Janet Austin has sustained significant joint damage resulting in severe mobility impairment from the autoimmune disease rheumatoid arthritis. Multiple joints are now unstable, misshapen, and painful. Muscle strength is limited and a number of joints are dislocated or at risk for becoming so. . . . Janet is currently taking multiple medications to help manage the disease. The long term nature of the disease and the medications she must take can result in serious side effects. A few years ago, she was diagnosed with osteoporosis. Due to the extent to the damage and given the additional complications resulting from a chronic disease, assistance in the home would improve her quality of life, help preserve her strength and independence, and protect her joints." See Exhibit No. 10 [letter from Raphaela Goldbach-Mansky, MD].
5. Dr. Griffin's letter states "This letter is to certify that Mr. Craig Brasfield has been evaluated in the Johns Hopkins Neuromuscular Clinic on October 31, 2006 and has been diagnosed with amyotrophic lateral sclerosis (ALS). ALS is progressive, fatal neuromuscular disorder characterized by progressive muscle wasting and weakness, culminating in respiratory decompensation due to diaphragmatic weakness. Because of the current stage of Mr. Brasfield's illness, he requires home assistance with daily activities." See Exhibit No. 11 [letter from John W. Griffin, MD].

STANDARDS FOR EVALUATION

Based upon the petitioners' binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. The Board finds that the lot does not meet the uniqueness requirement of section 59-G-

3.1(a), despite its irregular shape, since any effects due to its shape are mitigated, as the subject property exceeds the minimum lot size for the zone by 1,315 square feet. In addition, while there was testimony that the topography of the lot is sloping in certain areas, there was no testimony to indicate that this is a condition unique to the subject property.

The requested variance does not comply with the applicable standards, the Board finds, however, that the variance can be granted as a reasonable accommodation of the petitioners' disability under Title II of the Americans With Disabilities Act (ADA) and the Fair Housing Amendments Act of 1988 (FHAA) provisions.

Determination of Disability

The ADA and FHAA define a person's disability, or handicap, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A); 42 U.S.C. §3602(h).

Whether an individual has an impairment and whether the impairment substantially limits a major life activity is to be determined on a case-by-case basis. *Dadian v. Village of Wilmette*, 269 F.3d 831, 837 (7th Cir. 2001) (citations omitted).

Prohibition on Housing Discrimination Based on Disability

The FHAA and Title II of the ADA prohibit housing discrimination based on an individual's handicap or disability.

The FHAA prohibits discrimination against "any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling" on the basis of that person's handicap. 42 U.S.C.A. §3604(f)(2). The FHAA definition of discrimination includes a refusal to make reasonable accommodations in "rules, policies, practices or services when such accommodation may be necessary to afford" a person with a handicap "equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). A "necessary accommodation" to afford "equal opportunity" under FHAA will be shown where, but for the accommodation, the disabled person seeking the accommodation "will be denied an equal opportunity to enjoy the housing of their choice." [See *Trovato v. City of Manchester, N.H.*, 992 F.Supp. 493, 497 (D.N.H. 1997) (citing *Smith & Lee Assocs. v. City of Taylor*, 102 F3d 781, 795 (6th Cir. 1996).] A failure to make a reasonable accommodation need not be supported by a showing of discriminatory intent. [See *Trovato*, 992 F. Supp. at 497 (citing *Smith*, 102 F.3d at 794-96).]

Reasonable Accommodation by Local Government of an Individual's Disability

The "reasonable accommodation" provision of the FHAA has been interpreted to require municipalities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without

disabilities.” [See *Trovato*, 992 F. Supp. at 497 (citing *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir. 1996)).] Similarly, Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an “activity” of a public entity within the meaning of the ADA. [See *Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n. 16 (citing *Trovato*, 992 F.Supp. at 497).]

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications “would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would “fundamentally alter or subvert the purposes” of the zoning ordinance, the variance must be granted under Title II of the ADA. [See *Trovato*, 992 F.Supp. at 499.]

FINDINGS OF THE BOARD

Based on the above, the Board must make the following findings:

1. Determination of disability: An evaluation of whether a disability exists under the ADA or FHAA requires a three-step analysis. The applicant’s medical condition must first be found to constitute a physical impairment. Next, the life activity upon which the applicant relies must be identified (i.e. walking, independent mobility) and the Board must determine whether it constitutes a major life activity under the ADA and FHAA. Third, the analysis demands an examination of whether the impairment substantially limits the major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

2. Non-discrimination in housing: The Board must find that the proposed variance constitutes a reasonable accommodation of existing rules or policies necessary to afford a disabled individual equal opportunity to use and enjoy a dwelling.

3. Reasonable modification of local government policies: Because zoning ordinances are among the varieties of local government rules subject to Title II of the ADA and the FHAA, the Board must find that the proposed variance must be granted in order to avoid discrimination on the basis of disability unless the proposed accommodation would fundamentally disrupt the aims of the zoning ordinance.

Applying the above analysis to the requested variance, the Board finds as follows:

1. The petitioners need for assistance in the home daily to improve the quality of life, to help preserve strength and independence, and for protection of joints demonstrate that more than one of the petitioners’ major life activities are restricted. Because of the direct impact that these and other impairments set forth in the record have on the petitioners’ major life activities, the Board finds that a disability exists pursuant to the definitions in the ADA and FHAA. The Board finds that the proposed construction of a

one-story addition would constitute a reasonable modification to address the accessibility and other medical needs of the petitioners.

2. The Board finds that the proposed addition would allow the petitioners an equal opportunity to use and enjoy the subject dwelling.

3. The Board finds that the proposed addition will not undermine the intent of the Zoning Ordinance. One-story additions are commonly found in residential areas such as the R-60 Zone in which the subject property is located, and are consistent with the intent of the Zoning Ordinance to promote a residential scale and streetscape in residential zones. The Board further finds that, although the proposed construction of this one-story addition requires a variance pursuant to Sections 59-C-1.323(b)(2) of the Zoning Ordinance, the grant of the variance would not encroach beyond the required seven (7) foot side lot line setback. The subject property is a corner lot and the area of the requested variance is treated as a side yard by the property owners. Accordingly, the proposed construction will not impair the intent, purpose, and integrity of the general plan or the approved area master plan affecting the subject property. Therefore, based upon the petitioners' binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioners' disability because (1) it will not fundamentally alter or subvert the purposes of the Zoning Ordinance; and (2) the proposed construction is necessary to permit the petitioners' equal access to the use of this home.

Accordingly, the requested variance of thirteen (13) feet from the required twenty (20) foot rear lot line setback is **granted** subject to the following conditions:

1. The petitioners shall be bound by all of their testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 5 [rear and side elevations] and 13(a) [revised site plan].

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

Board Chair Allison Ishihara Fultz was necessarily absent and did not participate in this Resolution. On a motion by Caryn L. Hines, seconded by Catherine G. Titus, with Wendell M. Holloway and Donna L. Barron, Vice Chair, in agreement, the Board adopted the foregoing Resolution.

Donna L. Barron, Vice Chair
Montgomery County Board of Appeals

I do hereby certify that the foregoing
Opinion was officially entered in the
Opinion Book of the County Board of
Appeals this 9th day of February, 2007.

Katherine Freeman
Executive Director

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve (12) month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.